COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

RE: COMPETITIVE MARKET INITIATIVES DTE 01-54

Comments of the Massachusetts Union of Public Housing Tenants and National Consumer Law Center

August 10. 2001

The National Consumer Law Center ("NCLC"), on behalf of and in conjunction with the Massachusetts Union of Public Housing Tenants ("MUPHT"), offers these comments in response to the Department's invitation to file comments on the use of electronic signatures to sign up for service from a competitive energy provider. July 27, 2001 Memorandum in DTE 01-54 ("July 27 Memorandum"). MUPHT and NCLC also include comments on the continuing need to protect the confidentiality of customer information as energy markets become more competitive and more entities have access to customer information. MUPHT and NCLC are extremely concerned that the Department has already ordered the release of customer-specific information (name, address and rate class) that is private and confidential and that release of this information will likely lead to redlining of low-income households.

MUPHT is the oldest state-wide association of public and subsidized housing tenants in the United States. Its thirteen member board is elected from tenants who live in public or subsidized housing. MUPHT has been formally recognized and funded by the state's housing agency (the Department of Housing and Community Development) and also recognized by the federal Department of Housing and Urban Development as a partner in developing policies and regulations for public housing. The tenants who MUPHT represents are predominantly senior citizens living on small, fixed incomes and families with low-wage jobs. MUPHT is concerned, among other issues, that low-income people are less likely to have routine and easy access to the Internet, are often less sophisticated users of the Internet, and, therefore, are more likely to experience the problems and consumer abuses that can arise through Internet-based transactions. MUPHT is also concerned that the release of rate class information (including designation of low-income rate classes R-2 and R-4) will

lead to redlining of low-income households.

NCLC is a non-profit corporation organized under the laws of the Commonwealth of Massachusetts in 1971. Its purposes include representing the interest of low-income people and enhancing the rights of consumers. Throughout its history, NCLC has worked to make household energy more affordable and accessible to low-income households. NCLC was actively involved in the discussions that led to the passage of the Electronic Signatures in Global and National Commerce Act; in studies of that Act conducted by the Department of Commerce; and in commenting on regulations drafted by the Federal Reserve Board to implement the Act.

I. INTERNET-BASED CUSTOMER AUTHORIZATIONS

The Department has solicited comments on "whether the use of electronic signatures is valid in Massachusetts." July 27 Memorandum. State law (cited below) does not allow for the use of electronic signatures and, in the context of restructuring, requires that many transactional documents be in writing. While electronic signatures cannot be denied legal effect as a matter of federal law (cited below), companies that wish to avail themselves of the opportunities provided by federal law must comply with a number of requirements before electronic signatures can be deemed valid. NCLC and MUPHT will address the relevant state and federal laws as well as the policy issues and practical matters the Department should consider before allowing consumers, via electronic means, to switch to a new electric supplier or authorize the release of confidential information.[1]

A. The Restructuring Act: Overview

The 1997 Restructuring Act, St. 1997, c. 164 (hereafter, "Act") contains detailed provisions regarding the written disclosures that must be made to a consumer prior to the initiation of service by a "generation company, aggregator, or supplier" (referred to collectively as "competitive supplier(s)" in these comments). G.L. c. 164, §1F(5)(i)("Section 1F(5)"). The Act also contains extensive protections to make sure that a customer has affirmatively

[1] In these comments, NCLC and MUPHT will focus primarily on the use of electronic signatures to authorize switching of generation suppliers and on delivery of required transactional documents in electronic rather than paper format. The issues regarding electronic authorization to release confidential customer information (e.g., load data, billing history) are generally similar but not addressed in any detail in these comments.

chosen a competitive supplier before a switch to that supplier can be completed. G. L. c. 164, §1F(8)("Section 1F(8)"). The Department has promulgated regulations to implement these statutory requirements. 220 CMR 11.00. Electronic signatures and authorizations are not allowed under the Act or implementing regulations and appear to be prohibited under any fair reading of the wording chosen.[2]

In passing the Act, the legislature clearly expressed its concern that competitive suppliers must disclose to consumers all relevant prices, terms and conditions of any supply offer, as well as the environmental and labor attributes of the sources of supply. Section 1F(5).[3] Without full disclosure, consumers will not be able to adequately compare prices; determine the environmental impacts of the power they are purchasing; or fully understand the risks and benefits of switching to a competitive supplier.[4]

The legislature was equally concerned about the potential for "slamming," or switching of customers to competitive suppliers without their full knowledge, understanding and consent. Section 1F(8). The legislature mandated that:

> "Each customer choosing a generation company or its affiliate, subsidiary, or parent company, or a supplier or aggregator shall be required to *affirmatively choose* such entity. . . . For the purposes of this section, the term 'affirmative choice' shall mean *the signing of a letter of authorization, third party verification, or the completion of a toll-free call made by the customer to an independent third party. . . .*"

Id. (emphasis added). Nothing in Section 1F(8) or any other provision of the Act allows for the use of electronic signatures or electronic letters of authorization. The detailed list of three means of authorization (letter of authorization, third-party verification, or toll-free call to an independent third party) precludes the use of other means. There is little doubt that the legislature intended competitive suppliers, when obtaining "letters of authorization," to receive a written, paper document from the consumer. "Letter of authorization" is defined, *inter alia*, to mean a "separate document" or "easily separable document" that is "signed and dated by the consumer." Further, the letter "must be *printed* with a readable type." *Id.*[5]

The Act thus requires the Department to ensure that the required disclosures are made to customers and that customers have freely and knowingly authorized a change in generation supply before such a change can be completed. The Act itself does not allow for electronic signatures or electronic documents to accomplish these goals.

B. <u>The federal E-Sign Act: Overview and Discussion</u>

The Electronic Signatures in Global and National Commerce Act, P.L. 106-229, 15 USC §7001 *et seq.* ("E-Sign") provides:

> ". . . with respect to any transaction in or affecting interstate or foreign commerce - (1) a signature, contract or other record relating to such transaction may not be denied legal effect, validity or enforceability solely because it is in electronic form. . . ."

15 USC §7001(a)(1). Federal law thus authorizes the use of "electronic signatures,"[6] and a state could not prohibit a competitive supplier from engaging in this business practice. But E-Sign also allows a state to "modify, limit or supersede" E-Sign's core provisions, as contained in 15 USC §7001, if the state law or regulation:

> "specifies the alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures to establish the legal effect, validity or enforceability of contracts or other records"

and those state procedures are otherwise consistent with the provisions of E-Sign. 15 USC §7002(a). Thus, the Department can harmonize the

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[2] Massachusetts has not adopted the Uniform Electronic Transactions Act (see 15 USC §7002) and therefore has not separately provided for the use of electronic signatures.

[3] The Department promulgated information disclosure requirements at 220 CMR 11.06.

[4] There is no doubt that the Attorney General's regulations for Retail Marketing and Sale of Electricity require that disclosures be provided in paper form. *See, e.g.*, 940 CMR 19.05(3)(information must be provided "in writing, in no less than ten point type for textual material and eight point type for footnotes, and in print that contrasts clearly with the material on which it is printed").

[5] The Department promulgated implementing regulations regarding customer authorization at 220 CMR 11.05(4).

[6] "The term 'electronic signature' means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record." 15 USC §7006(5).

Restructuring Act and E-Sign by adopting rules or regulations that allow for the use of electronic signatures and electronic records, but that otherwise follow the disclosure[7] and verification requirements of the Act.

Entities that wish to use electronic signatures and documents to conduct their businesses are subject to a number of important limitations and requirements.

First, nothing in E-Sign "requires any person to agree to use or accept electronic records or electronic signatures." 15 USC §7001(b)(2). Should the Department amend its restructuring regulations to allow for electronic authorizations and signatures, it must protect the rights consumers have under §7001(b)(2) by requiring competitive suppliers to offer customers the option of conducting transactions via paper documents.

Second, and fundamental to the whole scheme of E-Sign, electronic documents do not suffice when:

> "a statute, regulation or other law requires that information relating to a transaction or transactions . . . be provided or made available in writing"

unless "the customer has affirmatively consented to such use and has not withdrawn such consent." 15 USC §7001(c)(1). This language is particularly relevant in the context of electric restructuring in Massachusetts because there are detailed "statute[s], regulation[s] or other law[s]" requiring written disclosures and written letters of authorization.

Congress has carefully defined and limited what constitutes "consent." In order for consent to be valid, the consumer must be informed of the "right or option . . . to have the record provided or made available on paper or in electronic form." 15 USC §7001(c)(1)(B)(i). The party seeking consent must advise the consumer of the right to withdraw consent at any time. *Id.* That party must also state whether the consent to receive documents electronically applies just to the particular transaction at hand (e.g., signing up for service with a supplier) or to other categories of documents (e.g., receiving monthly bills, future disclosures of emissions and labor characteristics, etc.) 15 USC §7001(c)(1)(B)(ii). This requirement is especially important here because competitive suppliers will potentially have long-term relationships with customers and send bills and other information on a monthly basis. Customers should understand that they will need to maintain for the indefinite future the computer capacity to accept electronic documents from the supplier.

In connection with the validity of any consent to receive documents electronically, Congress deliberately inserted the requirement that a consumer must "confirm his or her consent electronically, *in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent.*" 15 USC §7001(c)(1)(C)(emphasis added).[8] A competitive supplier cannot obtain a written document purportedly evidencing the customer's consent to do business electronically because that written document would not demonstrate the customer's ability to conduct business electronically. The demonstration requirement of §7001(c)(1)(C) is crucial at a time when more than one-half of all households have no Internet access and only about 40% have that access from a home computer. *"Falling Through the Net: Toward Digital Inclusion,"* National Telecommunications and Information Administration, www.ntia.doc.gov/ntiahome/fttn00/chartscontents.html. Even for those who have Internet access, consumers vary quite widely in their knowledge and technical capability, for

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[7] 15 USC §7001(f) provides: "Nothing in this title affects the proximity required by any statute, regulation, or other rule of law with respect to any warning, notice, disclosure, or other record required to be posted, displayed, or publicly affixed."

[8] *See, e.g.*, 146 Cong. Rec. S5219-5222 (daily ed. June 15, 2000)(statement of Senator Leahy): "[This bill] avoids facilitating predatory or unlawful practices . . . . [It] will ensure informed and effective consumer consent . . . so that consumers are not tricked into receiving notices and disclosures in an electronic form that they cannot access or decipher. . . . I maintained that any standard for affirmative consent must require consumers to consent electronically to the provision of electronic notices and disclosures in a manner that verified the consumer's capacity to access the information in the form in which it would be sent."

example, to open files attached to e-mails or to open, download and save documents sent in WordPerfect, Microsoft Word, Adobe or other formats.9 Before the Department allows consumers to conduct business with competitive suppliers through electronic means, it should solicit comments from interested parties about how the requirements of 15 USC §7001(c)(1)(C) will be met. In particular, the electronic communications between the consumer and the competitive supplier that purport to manifest consent must be in the same format and require the same hardware and software configuration that the competitive supplier will use to provide or deliver future bills and communications. Failure to strictly enforce this rule would allow a supplier to sign up a customer using one format but then deliver future documents in another format or by sending the consumer an e-mail with only a reference to a web site that the consumer cannot readily access due to hardware or software limitations. To reinforce this principle that sellers should not be transacting business with consumers who cannot easily access information electronically, Congress also included 15 USC §7001(c)(1)(D), which provides that consent is no longer valid "if a change in the hardware or software requirements needed to access or retain electronic records creates a material risk that the consumer will not be able to access or retain a subsequent electronic record," unless new disclosures are made and the consumer provides new and valid consent.

Competitive suppliers obviously see great advantages in electronic signatures and electronic delivery of the many documents that must be delivered under the Act or implementing regulations promulgated by the Department or Attorney General.10 Electronic communications are fast and inexpensive. Cyberspace reduces customer acquisition, billing and customer service costs. Customers who sign up via the Internet generally pay (and are sometimes required to pay) by credit card, reducing payment lags, bad debt, and the costs of processing checks. From the supplier's perspective, there are many advantages and no disadvantages.

From the perspective of consumers, there are many parallel advantages. Consumers can conduct transactions quickly and easily, from computers at work or at home. Electronic transactions eliminate the need to fill out forms, address envelopes, use postage, or visit the mailbox. Sophisticated computer users may find it easier to download and retain documents on their computers than to file or keep track of paper copies.

But using electronic rather than written documents poses much greater risks for consumers, especially those who are not sophisticated about using the Internet and retaining electronic documents.11 The risks revolve around the adequacy of disclosure and the accessibility of communications; the reliability and predictability of mail versus electronic delivery; the fixed nature of paper documents versus the inherently fluid nature of electronic documents; and the hardware and software requirements that are unique to electronic communications.

First, it is much easier for a consumer to obtain and review written disclosures and communications. The Department's and the Attorney General's regulations require quite extensive disclosures and carefully prescribe the content of various supplier communications. *E.g.*, 220 CMR 11.05(3)[content of bills]; 11.05(4)[content of letters of authorization]; 11.06 [disclosure labels for prices, customer service information, and fuel/emissions/labor characteristics]; 940 CMR 19.05 [content and format of disclosures]. In paper form, consumers can readily hold in their hands and see the overall content of a particular bill, disclosure or communication. They can "browse" a written document forward and back without any risk of missing links or pages. In electronic form, the consumer may need to refer to a combination of e-mails from the supplier, attached files, and the supplier's web sit; may have to move through various linked pages within a web site; and will generally need to be skilled in electronic navigation.12

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9 The Department itself has over the past several months changes its requirements for the format of electronic filings, presumably because its capability to accept WordPerfect, Word and Adobe documents has increased.

10 There is no doubt that federal law does not affect or preempt any state laws or regulations requiring the physical delivery of written utility termination notices. 15 USC §7003(b)(2).

11 Under E-Sign, states explicitly retain broad authority to "specify performance standards to assure accuracy, record integrity, and accessibility of records that are required to be retained." 15 USC§7004(b)(3)(A). The Department should fully avail itself of its authority under this provision and require competitive suppliers to maintain accurate and secure records of transactions with consumers. Many consumers will not retain electronic copies of key transactional documents.

12 All but the most skilled users of the Internet have had the experience of finding or being referred to a particular web site yet not being able to find where on that web site the sought-after information is

Clearly, there are many consumers for whom this would be challenging, at best. In written form, the consumer can put the document in a file and read it at a later date, knowing it will not change. In electronic form, the consumer may have a hard time navigating back to that same web site, and the information on that site may well have changed.

Second, mail delivery via the postal service (or other carrier) remains fundamentally different than electronic delivery, with the differences almost always creating risks for consumers, not suppliers. When Congress passed E-Sign, it directed:

> "the Secretary of Commerce . . . [to] conduct an inquiry regarding the effectiveness of the delivery of electronic records to consumers using electronic mail as compared with delivery of written records via the United States Postal Service and private express mail services."

15 USC §7005(a). The ensuing "Report to Congress – Electronic Signatures in Global and National Commerce Act – Section 105(a)"13("Section 105(a) Report") noted the following key distinctions between postal versus electronic delivery:

> "Traditional document delivery is distinguished by universal access in that a written record can be read without cost to the recipient, while access to electronic mail requires a computer, mobile phone, or other telecommunications equipment. The reliability of written mail is demonstrated by the fact that a paper writing mailed to a person generally remains in the mailbox or the post office indefinitely until it is picked up by the recipient (or a designated agent) and will be forwarded to a recipient's new address. In contrast, an electronic record e-mailed to a person may disappear from the Internet Service Provider (ISP) or the server at any time before actually being read by the recipient, and generally will not be forwarded to the recipient if the Internet address has changed or the recipient has moved. Unlike paper transactions, electronic transactions also present the issue of authentication and require a determination of the identities of both the sender and recipient, particularly where the parties do not have a pre-existing business relationship and do not meet face-to-face. Privacy and security concerns, including potential interception, rerouting or alteration of the message, may be less of a concern for messages delivered by the postal service than for e-mail messages because of physical limitations on those with potential access to postal mail."

Id., Executive Summary.

Despite the jokes that are sometimes made about the Postal Service, it delivers the mail remarkably well almost all of the time, even when items are addressed somewhat incorrectly;14 sent in violation of postal rules;15 or directed to someone who has in fact moved.16 E-mail delivery fails quite frequently for a number of reasons, not least of which is the fact that in the last year alone 10% of those with Internet access lost or dropped their access. *"Falling Through the Net: Toward Digital Inclusion,"* Department of Commerce (Oct. 2000)(headings "Overall Household Findings" and "Why Households with Computers Have Discontinued Internet Access").

Third, written (paper) documents are fixed and unchanging. A consumer who receives written disclosures under the Act or written prices, terms and conditions can keep those documents in a file for as long as the consumer conducts business with the supplier. If disputes arise over what the supplier promised or offered, the consumer can easily support his or her complaint with hard, written proof. By contrast, consumers who conduct business via the Internet may have an impossible burden demonstrating what was on a web page or in an electronic document, given the frequency with which web pages change and the ease of altering (intentionally or inadvertently) electronic documents.

C. Conclusion: Electronic Signatures and Documents

The Restructuring Act does not allow for the use of electronic signatures to authorize the switching of generation suppliers or the release of

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located. Many web sites have "site maps" due to their size and complexity.

[13] www.ntia.doc.gov/ntiahome/ntiageneral/esign/105a/105areport.pdf

[14] For example, a letter to "NSTAR, Boston MA," particulary if mailed at a Boston-area post office, would likely be delivered to one of NSTAR's offices because postal workers can readily discern the sender's intent. By contrast, everyone who uses e-mail knows that typing a single character incorrectly will result in the message not being delivered. Even if correctly addressed, e-mails are often returned or mis-delivered for any number of reasons.

[15] For an amusing and interesting study of how well the Postal Service succeeds, see "Postal Experiments," Annals of Improbable Research, www.improb.com/airchives/paperair/volume6/ v6i4/postal-6-4.html. The researchers successfully sent through regular mail: (1) a $20 bill wrapped in clear plastic, with address and postage on a separate card tied to the plastic-wrapped bill; (2) a rose, tied to a card bearing an address and postage; (3) a ski, tied to a card with an address and large amounts of postage.

[16] There is not yet any widely-used electronic system comparable to the forwarding service that the Postal Service provides at no charge.

confidential information and requires the use of written documents for various disclosures, authorizations and transactions. While federal law (E-Sign) mandates that electronic signatures may be used, E-Sign also provides that states may adopt their own rules and conditions, so long as they are consistent with E-Sign. E-Sign itself includes a number of requirements and conditions that suppliers would have to meet before they could use electronic signatures and electronically-delivered documents to conduct their business. The Department should conduct further proceedings to develop the rules that will be necessary to implement E-Sign consistently with the requirements of state law.

. PRIVACY AND THE RELEASE OF CUSTOMER INFORMATION

The Department has moved hastily to force the release of unique, identifying information about distribution company customers to any competitive supplier that so requests. MUPHT and NCLC ask the Department to seriously rethink its prior order and to institute procedural and substantive safeguards that will protect private customer information.

On June 29, 2001, the Department issued its "Order Opening Investigation" in DTE 01-54. In that Order, at 6, the Department "directs each distribution company to provide, upon the request of a licensed supplier, the names, addresses and the rate classes of its default service customers." Based on the informal discussion at the July 24, 2001 Technical Session, it appears that companies have already complied. Some suppliers requested only the identifying information for commercial and industrial customer classes, while others requested the release for all classes. July 24 Trans., at 16 (WMECo sent data to six suppliers, "just for commercial and industrial"); at 17 (NGRID sent information on all customer classes to seven suppliers; NSTAR sent data to seven suppliers).

During the Technical Session, parties addressed whether the information is "proprietary." E.g., July 24 Trans., at 19. Focusing on whether the information is "proprietary," in the sense of sensitive information owned by the distribution company that it should not be required to release,[17] obscures the more important question of whether the information is the *customer's private information* that the distribution company cannot release without permission. MUPHT and NCLC are very concerned that the Department has ordered the release of information for hundreds of thousands of customers, without hearing extensivelyfrom them or properly considering their rights. The July 24 Technical Session revealed that even though consumers have had almost no ability to learn about release of their information in advance, some did in fact contact utilities and ask that their information not be released. July 24 Trans., at 17-18 (". . .a dozen customers call[ed]. They wanted their names removed from the list. *I don't know where they got the information. . . .*").

Under Massachusetts law, a "person shall have a right against unreasonable, substantial or serious interference with his privacy." G.L. 214, §1B. At least one Massachusetts court has found that a complaint under §1B based on the release by one company to another company of names and addresses cannot be dismissed at the summary judgment stage and that the case should proceed to trial to determine if a privacy violation occurred. *Weld v. CVS Pharmacy,* 1999 WL 494114 (Mass. Super. Ct. 1999), aff'd on other grounds, sub nom. *Weld v. Glaxo Wellcombe, Inc.* 434 Mass. 81 (2001)(ruling on class action certification). The trial court in *Weld* specifically found:

> "It is not clear, however, that disclosure of such information [name, address and date of birth] may not constitute an actionable violation of [plaintiff] Kelly's rights."

1999 WL 494114 **3.

The facts of *Weld* bear some striking similarities to release by a distribution company to a competitive supplier of customer-specific information to promote the latter's marketing efforts, although the privacy violations may be more serious here. In *Weld,* CVS screened its customer lists to identify those with specific medical conditions for the benefit of pharmaceutical companies looking to market their products; here, distribution companies scan their lists to identify default customers for the benefit of suppliers looking to market their products. In *Weld,* CVS itself, not the pharmaceutical companies, sent the mailings that the pharmaceutical companies provided, so that the latter companies never saw the names and addresses

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[17] *Black's Law Dictionary* (4th Ed.) defines the adjective proprietary as "belonging to ownership; belonging or pertaining to a proprietor; relating to a certain owner or proprietor."

of individual customers. Here, the distribution companies turn over the identifying information directly to the suppliers.18 Thus, the Department's legal conclusion, DTE 01-54 (June 29, 2001), at 6, that a customer's name, "address and class of service are not proprietary" avoids the question of whether the information is private and is undermined by the still-evolving case law under G.L. c. 214, §1B.

Release of name, address and rate class information harms all customers who feel that this information is private. To heighten the problem, most and possibly all distribution companies have promised their customers in writing that this information will be kept private. See, e.g., "NSTAR Online Privacy Statement/Disclosure," www.nstaronline.com/about/ aboutnstar_online_privacy_statement.htm ("NSTAR will not sell or trade your personal information to any third party, absent specific authorization by you."); "Keyspan Privacy Statement," www.keyspanenergy.com/privacy/index.cfm ("We . . . will not disclose your customer information to other third parties that may want to market other products or services to you.") The Department has thus ordered companies to breach explicit promises made to their customers and upon which customers had reason to rely.19 The Department's actions are particularly troubling in light of a statutory mandate to regulate "the confidentiality of customer records." G.L. c. 164, §1F(7).

Perhaps more troubling than the pure breach of privacy issues, release of name, address and rate class will likely lead to redlining of low-income households and consequent economic harm. If competitive suppliers receive residential sub-class identification, they will be able to distinguish low-income residential customers from other residential customers. The Department is well aware that the margins on selling electricity at retail to residential customers are thin to non-existent and have been negative at most times since retail markets opened in 1998. Suppliers will avoid marketing to any customer who has been identified as low-income, to avoid the risk of non-payment or the costs of more frequent customer service calls to work out payment plans. Thus, even if a vibrant, competitive market for retail electricity finally develops in Massachusetts, many low-income customers will be excluded from receiving offerings.

If retail electricity markets were working in Massachusetts, suppliers would have products and service that provide real savings for consumers. They would buy lists of names and addresses through various commercial sources and widely advertise their offerings. In the truly competitive cellular telephone market, for example, companies spend millions on daily ads in major newspapers, billboards in every metropolitan area, and on TV and radio.

But the retail market for electricity in Massachusetts barely exists, especially for residential consumers. July 24 Trans., at 16 ("no one is willing to serve residential"). Thus, the Department has taken the extraordinary step of ordering the release of private information on almost 600,000 residential default customers20 to promote a market that does not yet exist.

This is an extraordinary governmental intervention into the marketplace on behalf of companies that have so far offered little to consumers. Recently, both Essential.com and Utility.Com, two of the few companies that ever offered service to residential customers, went out of business. In the case of Essential.com, questions have been raised about whether amounts charged to the credit cards of consumers will be "passed along to service providers." "*Shutdown Looms for Essential.com,*" July 27, 2001 *Boston Globe.* Once a competitive supplier becomes insolvent and faces bankruptcy, any representations they may have made to customers, distribution companies or the Department itself about keeping information confidential will evaporate. Since the Department's only meaningful enforcement tool is license suspension or revocation, enforcement is completely toothless.

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[18] In addition, CVS was paid by the pharmaceutical companies. By contrast, the distribution companies have turned over their information for free, depriving ratepayers of potential revenues that could either reduce rates or at least mitigate the need for future rate increases. Lists of utility company names have non-trivial market value. See "*Essential puts on fire sale*," August 2, 2001 *Boston Globe*, p. C1 (customer list of 70,000 names put on sale for $1 million); "*Ailing telecom firm sells name list*," August 10, 2001 *Boston Globe*, p. C1 (company pays $22 per name for list).

[19] Had the companies released this information on their own, they would likely be liable for damages under G.L. c. 93A, breach of contract and breach of privacy claims, given the explicit representations made.

[20] As of June, the Division of Energy Resources listed 577,000 residential customers on default service.

NCLC and MUPHT recommend that the Department take immediate steps to address the privacy problems it has created. First, it should direct any supplier that has received a list including residential customer information to return that information to the distribution company and to destroy any copies (including electronic copies) in its possession.21 Second, the Department should establish a procedure that will allow residential customers to protect their information from release if they so choose, before any further rel eases occur. NCLC and MUPHT do not presently take a position on whether the procedure for release of name and address should be on an opt-in versus opt-out basis but will participate in any proceedings to develop fair procedures that balance the privacy interests of consumers with the interests of suppliers. MUPHT and NCLC, however, strongly oppose the release of billing history and load data on anything other than an opt-in basis. See 220 CMR 11.05(4). Third, the Department should prohibit the release of rate class information that would allow a supplier to determine that a customer is on a low-income rate. Release of this information provides too easy and inviting an opportunity for redlining by suppliers.

. **CONCLUSION**

MUPHT and NCLC appreciate the opportunity to file comments in this proceeding and reserve their right to file reply comments by August 17, 2001.

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21 MUPHT and NCLC take no position regarding the release of information on commercial or industrial customers.